SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1049

SAMUEL G. FERRARRO, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

SAMUEL G. FERRARRO, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Samuel G. Ferraro petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra,* pp. 1a-2a) is unreported. The order of the district court (App. B, *infra,* p. 3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner was convicted of several federal criminal violations following a trial at which he chose not to testify on his own behalf. Immediately following his conviction, and while his appeal was pending, the United States Attorney who prosecuted petitioner brought him before a grand jury and sought to compel him to testify regarding the conduct which had served as the basis for his indictment and conviction. Upon petitioner's refusal to testify despite the granting of use immunity, he was committed to prison for civil contempt pursuant to 18 U.S.C. 1826(a).

The question presented is whether the granting of use immunity adequately supplants the Fifth Amendment privilege against self-incrimination in circumstances where the Government seeks to compel testimony regarding criminal conduct from an individual who exercised his right to remain silent at his trial and was convicted, while the individual's appeal from that conviction is pending.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Organized Crime Control Act or 1970, P.L. 91-452, 84 Stat. 932, codified in various sections of 18 U.S.C. and 28 U.S.C., provides in relevant part:

> § *6002* [18 U.S.C.]. *Immunity generally*
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify

or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

* * * *

§ *6003* [18 U.S.C.]. *Court and grand jury proceedings*

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy

Attorney General, or any designated Assistant Attorney General request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

* * * *

§ *1826* [28 U.S.C.]. *Recalcitrant witnesses*

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which order such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

STATEMENT

Petitioner was indicted by a grand jury in the United States District Court for the Western District of Pennsylvania on several counts of making false statements on his income tax returns (26 U.S.C. 7206(1))

and conspiring to obstruct justice (18 U.S.C. 1511), arising from allegations that he accepted rackets payoffs while an Allegheny County detective. At his subsequent trial petitioner chose not to testify on his own behalf, but conducted his defense by challenging the legal sufficiency of the Government's case and the credibility of its witnesses.[1] Petitioner was convicted on November 2, 1973, and was sentenced to imprisonment for a term of six years, probation for five years, a fine of $30,000 and the costs of prosecution. He filed a notice of appeal from his conviction on November 7, 1973, and the appeal is pending.[2]

Immediately after he had been sentenced, and while his appeal was pending, petitioner was subpoenaed to appear before a federal grand jury, and appeared on November 13, 1973. At that time the United States Attorney who had prosecuted him attempted to question petitioner regarding the transactions that were the focus of his criminal prosecution. Petitioner declined to testify on Fifth Amendment grounds, and on the same day the Government applied for and received a grant of testimonial immunity pursuant to 18 U.S.C. 6003. Petitioner was brought back before the grand jury that day and again declined to answer questions relating to his criminal conviction, asserting that such

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[1] The principal Government witnesses against petitioner were all admitted lawbreakers; some had engaged in illegal gambling, others had given false testimony under oath, and others were convicts facing federal charges.

[2] The case has been docketed in the court of appeals as *United States* v. *Ferraro*, No. 73-1959. The court reporter has asked for and received from the court of appeals an extension of time in which to file the trial transcript. Appellant's brief will be due thirty days after the filing of that transcript.

answers would prejudice his pending appeal, and any resulting retrial or motion to reduce sentence. See 18 U.S.C. 6002.

Upon petitioner's refusal to testify pursuant to the grant of immunity, the district court ordered him held in civil contempt and committed him to prison without bail until he agreed to testify or the grand jury's term expires, under 28 U.S.C. 1826 (Appendix B, *infra*, p. 3a).[3] The district court concluded that "after a grant of immunity this testimony must be given, and it seems to me it is also quite clear that the Court has no discretion in the matter" (Excerpts from Proceedings of November 13, 1973).

Petitioner's appeal from the contempt citation was affirmed by the court of appeals on December 5, 1973 (Appendix A, *infra*, pp. 1a-2a). At oral argument of the appeal, the Government represented that, if petitioner's criminal appeal were successful, it would limit its evidence and witnesses to those presented in petitioner's first trial. The Government further represented that because it uniformly opposed motions to reduce sentence, petitioner would not be prejudiced in any such proceeding because of the availability of his compelled testimony to the Government.[4] The court of appeals accepted these stipulations and concluded that they demonstrated that the Government "will not use against the appellant in any way the testimony given by him before the grand jury" (Appendix A, *infra*, p. 2a).

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[3] The grand jury began its service on September 25, 1973, and accordingly its term will expire on March 25, 1973.

[4] See Appendix C, *infra*, p. 4a.

REASONS FOR GRANTING THE WRIT

This case raises important questions involving the application of the use immunity provisions of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, 6003, left open when this Court upheld the facial constitutionality of these provisions in *Kastigar* v. *United States*, 406 U.S. 441.[5] The principal issue is whether the granting of use immunity is sufficient to provide protection "coextensive with the scope of the privilege against self-incrimination" (406 U.S. at 453) in circumstances where the Government seeks to compel testimony regarding criminal conduct from an individual who exercised his right to remain silent at his trial and was convicted, while the individual's appeal from that conviction is pending. The issues include whether the availability of such testimony to the prosecutor before he formulates his appellate position[6] constitutes use of compelled testimony "in any respect" which is forbidden under *Kastigar*. Finally, this case raises the issue of the appropriate safeguards which

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[5] *Kastigar* "was directed solely to the issue of the statute on its face" and did not reach the issue of whether the protection provided therein may be inadequate in a particular instance. *In Re Baldinger*, 356 F. Supp. 153, 156 (C.D. Cal.). Thus, as in *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 52, "[a]lthough it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face."

[6] In addition, the testimony would be available well before any proceedings which may result from the appeal, including any retrial or a motion to reduce sentence. If the petitioner elects to remain silent in such proceedings, the prosecutor would nonetheless have available to him petitioner's compelled testimony before the prosecutor prepares his case.

must be applied to prevent the non-evidentiary use of petitioner's testimony even assuming it may be constitutionally compelled under these circumstances.

It is difficult to dispute the proposition that these issues are substantial, and their resolution important to the proper functioning of the Organized Crime Control Act.[7] That Act represents "a seriously conceived and long-overdue legislative attempt to deal with the important problem of successful prosecution of organized crime," and its immunity provisions were considered essential to its successful functioning by permitting "effective displacement of the privilege against self-incrimination * * *." H. R. No. 1459, 91st Cong., 2nd Sess., at 1970 U.S.C.C.A.N. 4007, 4008; and 4073 (Additional views of Congressman Dennis). Because many of the criminal activities investigated under that Act involve crimes wherein only the participants can provide evidence regarding those activities,[8] situations such as that present here—where the Government desires testimony from a convicted defendant prior to the time his conviction is reviewed on appeal—will be recurrent. Thus, resolution of these issues is important not only to this petitioner but to the United States as well.

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[7] Certainly, had the court of appeals ruled in favor of petitioner's contention that he may not be compelled to testify before the grand jury regarding matters involved in his criminal appeal prior to its completion, the Government would have viewed that decision as being of substantial importance to the administration of the Act.

[8] See *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 92 (White, J., concurring); *Kastigar* v. *United States*, 406 U.S. 441, 446-447.

Moreover, the uncertainty as to the sufficiency of use immunity under *Kastigar* where the Government seeks to compel testimony related to an individual's conduct prior to conclusion of criminal charges arising from that conduct has led to conflicting results in the lower federal courts. Compare *Goldberg* v. *United States*, 472 F.2d 513 (C.A. 2) (witness may be compelled to testify prior to trial beginning) and *United States* v. *Kelly*, 464 F.2d 709 (C.A. 5) (witness not entitled to vacation of conviction when testimony compelled while appeal pending) with *United States* v. *Domenech*, 476 F. 2d 1229 (C.A. 2) (witness could not be convicted for contempt in refusing to testify after pleading guilty but before sentencing) and *United States* v. *Dornau*, 359 F. Supp. 684 (S.D.N.Y.) (indictment must be dismissed where prosecuting attorney saw compelled testimony prior to trial). And, prior to *Kastigar*, another court of appeals squarely held that the prosecuting attorney's receiving compelled testimony prior to trial "violated the defendant's Fifth Amendment rights and constitutes a prima facie 'use' of the testimony" because it did not "leave 'the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a * * * grant of immunity.'" *United States* v. *McDaniel*, 449 F. 2d 832 (C.A. 8).[9]

This Court should grant the petition for a writ of certiorari to resolve this uncertainty and decide the important questions presented under the Organized Crime Control Act.

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[9] See, taking the same approach when appellate proceedings are pending, *Frank* v. *United States*, 347 F. 2d 486 (C.A.D.C.) and *Mills* v. *United States*, 281 F. 2d 736 (C.A. 4).

1. The Fifth Amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself." This prohibition prevents the Government from forcing an individual to contribute to the imposition of criminal penalties upon himself. *Ullmann* v. *United States*, 350 U.S. 422, 438. However, while an individual may not be "compelled to incriminate himself in any manner," *Miranda* v. *Arizona*, 384 U.S. 436, 476, it has long been recognized that testimony may be compelled providing that immunity coextensive with the constitutional protection is provided. E.g., *Brown* v. *Walker*, 161 U.S. 591; *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52.

In *Kastigar* v. *United States*, 406 U.S. 441, this Court upheld as constitutional on their face provisions authorizing the grant of use immunity contained in the Organized Crime Control Act of 1970, 18 U.S.C. 6002, 6003. The petitioner there contended that only transactional immunity, precluding his future prosecution for any criminal activity disclosed by his compelled testimony, offered protection consistent with the Fifth Amendment privilege. Rejecting this argument, the Court held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege." 406 U.S. at 453.

The Court reasoned that use immunity was constitutionally sufficient whenever it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed his privilege" under the Fifth Amendment. 406 U.S. at 458-9.

See also *Murphy* v. *Waterfront Commission of New York Harbor, supra,* 378 U.S. at 79. To insure that this would be the case, the Court concluded:

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom * * * [must] prohibit the prosecutorial authorities from using the compelled testimony in *any* respect * * *.

406 U.S. at 453, emphasis in original. And, because Kastigar had not been indicted but feared that evidence resulting from his testimony might be used in a future prosecution, the Court imposed on the Government in such circumstances "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." This burden, the Court concluded, provided "very substantial protection" commensurate with the privilege itself. 406 U.S. at 460, 461.

Kastigar did not involve, and therefore the Court did not determine, the constitutionality of use immunity in circumstances other than those presented by that case. Cf. *Zicarelli* v. *New Jersey State Commission on Investigation,* 406 U.S. 472, 478. In particular, the decision did not settle whether use immunity is sufficient to supplant the privilege against self-incrimination where the Government seeks to compel testimony regarding conduct from an individual who is undergoing prosecution for that conduct. Nor did the decision determine whether *non-evidentiary* use of the compelled testimony by the prosecutor while he is preparing the Government's position would violate

Kastigar's prohibition against "using the compelled testimony in *any* respect * * *."[10]

2. The court of appeals upheld the invocation of the use immunity statue where "the Government sought to extract from the petitioner, under the threat of a contempt conviction, testimony which it could not have compelled at the original trial," *Piemonte* v. *United States,* 367 U.S. 556, 564 (Warren, Ch. J., dissenting), while petitioner's appeal from conviction at that trial was pending. Even leaving to one side questions of fundamental fairness in such a procedure,[11] making such testimony available to the prosecutor who conducted petitioner's trial before he must formulate his

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[10] The petitioner in *Kastigar* argued that his testimony might be used against him in ways other than producing evidence, by permitting the prosecutor to "obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution." 406 U.S. at 459. Such evidentiary uses, the Court concluded in rejecting this argument, can be prevented by scrupulous application of the statute's prohibition against any use of the testimony. In contrast to the evidentiary use of testimony to obtain leads focused on in *Kastigar,* what is involved here is the non-evidentiary use of testimony given, to formulate an appellate position, where the prosecution would not otherwise have access to the material because the petitioner chose to remain silent at trial.

[11] As Justice Douglas, with Justice Black's concurrence, pointed out in dissent in *Piemonte* v. *United States, supra:*

> There is no power in our free society to compel a person to talk about a matter on which he has been indicted or to penalize him for failure to do so. We might as well say that an accused can be committed for contempt for failure to take the stand at his own trial.

367 U.S. at 566.

appellate position constitutes such actual "use" of that testimony which is forbidden under the Fifth Amendment.

It is clear that the privilege against self-incrimination is not limited solely to protecting an individual from such use of his compelled testimony that results in presentation of evidence to a jury. What the Fifth Amendment forbids is "using the compelled testimony in *any* respect," *Kastigar, supra,* 406 U.S. at 453, as evidence, leads to evidence, or in any other respect. See *United States* v. *Hockenberry,* 474 F. 2d 247, 249-50 (C.A. 3). While

> [t]o be sure, evidence presented to the jury is the most tangible example of an incriminating use of testimony, * * * prosecutorial actions not directly or exclusively related to the presentation of evidence can equally well facilitate conviction. For example, the prosecutor's knowledge of the testimony may affect his decision * * * *to structure his general trial strategy* in a particular fashion.

Note: "The Supreme Court 1971 Term," 86 Harv. L. Rev. 1, 181, 184-5, emphasis added; accord: Note: "Standards for Exclusion in Immunity Cases After *Kastigar and Zicarelli*," 82 Yale L. J. 171, 185.[12]

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[12] See also the opinion of Chief Judge Seitz, concurring in *United States ex rel. Catena* v. *Elias,* 449 F. 2d 40, 45 (C.A. 3, en banc), reversed, 406 U.S. 952, noting that use immunity questions have traditionally focused on whether the prosecutor had made evidentiary use of the compelled testimony, and suggesting that the proper focus was on the effect upon the defendant's case. "The prosecutor is obviously in a position to tailor his questions, consciously or otherwise, on the basis of his knowledge of the defendant's prior testimony and can do so without any overt reference to the testimony given under immunity."

The situation is not realistically different if the compelled testimony is made available to the Government after conviction while the defendant's appeal is pending and the prosecutor is shaping his general appellate strategy. No one who has actually litigated criminal cases would characterize the advantage the prosecution gains by having access to the defendant's testimony, withheld at trial, as other than a generous bonus to the Government, and a substantial detriment to the defense. It can affect the appellate position presented by the United States, the arguments advanced, the concessions made, and the strategy employed looking toward further proceedings following the appeal.[13] These are precisely the sort of "real dangers, not remote and speculative possibilities," which "the privilege protects against." *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, 478.

Both before and after the decision in *Kastigar*, the lower federal courts have recognized that the privilege against self-incrimination prevents the Government from punishing an individual who invokes the privilege in regard to matters involved in a criminal prosecution then pending against him, whether that prosecution is at the trial or appellate stage. Thus, in *United States* v. *Domenech*, 476 F. 2d 1229 (C.A. 2), where the witness had pled guilty to criminal charges, the court pointed out that because the "evidence compelled * * * could well hamper a possible attempt by the witness to withdraw his plea before sentencing," any contempt

[13] The possible availability of the compelled testimony has already affected the Government's case on appeal, for in order to meet the petitioner's objection insofar as the Government is willing to do so, it has informed the court of appeals that it will oppose any attempt by petitioner to obtain a reduced sentence if his appeal is unsuccessful.

judgment which might be issued "could not be allowed to stand since in no way would it be perfectly clear that the answers would not possibly incriminate." 476 F. 2d at 1231. And, in *United States* v. *Dornau*, 359 F. Supp. 684 (S.D.N.Y.), the court dismissed a prosecution where the prosecutor had access to the defendant's testimony prior to trial, reasoning that there was no way to protect against "the effect that the reading of the [testimony] might have had on the conduct and thinking processes of the Assistant charged with prosecuting the case." 359 F. Supp. at 687.[14]

The court of appeals in *United States* v. *McDaniel*, 449 F. 2d 832 (C.A. 8) squarely held, prior to *Kastigar*, that the receipt by the prosecuting United States Attorney of the defendant's compelled testimony prior to trial

> violated the defendant's Fifth Amendment rights and constitutes a prima facie 'use" of the testimony which is prohibited by the *Murphy* v. *Waterfront Commission, supra*] exclusionary rule. * * *. [The defendant] can be put in the same position vis-a-vis the Federal Government only if the Federal Government is forbidden to see his testimony.

449 F. 2d at 837. Applying similar reasoning, another court of appeals concluded that the Government could

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[14] The court continued by holding that once "the prosecutor had read [the testimony], he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur, calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them. [citations omitted]. The breadth of this ruling is justified by the language in Kastigar that the immunized testimony could not be used 'in *any* respect.' " 359 F. Supp. at 687.

not compel testimony where the defendant "has been convicted with respect to the matters about which the testimony is compelled and his appeal from the conviction is pending when such testimony is given." *Frank* v. *United States*, 347 F. 2d 486, 491 (C.A.D.C.). Accord: *Mills* v. *United States*, 281 F. 2d 736 (CA. 4).[15]

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[15] But see *United States* v. *Kelly*, 464 F. 2d 709 (C.A. 5). There the court of appeals rejected a defendant's claim that compelling him to testify while his appeal was pending violated the Fifth Amendment despite a grant of use immunity. However, the court of appeals did not directly address the contention that compelling testimony under these circumstances, by contributing to the Government's appellate position, constitutes impermissible "use" of that testimony. Instead, because the criminal appeal had been affirmed by the time the court reviewed the contempt citation, the court held that the appellant was not entitled to have his conviction vacated as the only possible sanction, since this would constitute retroactive protection not embraced by the Fifth Amendment privilege. See *Katz* v. *United States*, 389 U.S. 347, 349, n. 3.

In *Goldberg* v. *United States*, 472 F. 2d 513 (C.A. 2), the court permitted the Government to compel testimony from an individual who had been indicted but not yet tried so long as the testimony was before a different grand jury from the one which had indicted him. The court apparently found no "distinction between a witness who has not yet been arrested and one who has already been." 472 F. 2d at 516 (Oakes, J., concurring). With deference to the court of appeals, there is all the difference in the world between compelling testimony from an individual who stands indicted of no crime and one who has been indicted for precisely the same conduct the Government seeks to inquire into. For example, while the court could compel a witness to testify at trial though a grant of use immunity, it could not similarly compel a defendant to testify at his own trial. This is precisely the conduct the Fifth Amendment precludes. Moreover, there is no indication in *Goldberg* that the Assistant United States Attorney who would prosecute Goldberg was the individual questioning him, as here; but the court did indicate that the grand jury could not be expected "to put Goldberg's answers out of their minds," 472 F. 2d at 516, and there is no reason to expect the court would have imposed a lesser standard upon the particular prosecuting attorney.

While these cases arose in differing factual circumstances, their underlying rationale simply cannot be squared with the decison here by the court of appeals. Where, as here, the Government stands to benefit from compelling testimony from an individual despite the granting of use immunity, such immunity does not leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed his privilege." *Kastigar, supra*, 406 U.S. at 459-460. Since the Government may not use "the compelled testimony in *any* respect," *Id.* at 453, it should not be permitted to obtain petitioner's testimony regarding the matters for which he was convicted while his appeal from that conviction is pending.[16]

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[16] Requiring a defendant to testify as to matters for which he is being criminally prosecuted before the prosecution has been completed may well constitute the functional equivalent of requiring him to testify first, should a retrial be ordered following appeal. This Court invalidated such a requirement in *Brooks* v. *Tennessee*, 406 U.S. 605, pointing out that this procedure "casts a heavy burden on a defendant's otherwise unconditional right not to take the stand. See also *Wardius* v. *Oregon*, 412 U.S. 470, 478, condemning a statute giving the state non-reciprocal discovery rights in criminal proceedings. Certainly the availability to the prosecution of the compelled testimony of the defendant regarding the conduct for which he has been indicted gives the Government substantially greater litigation advantages than those condemned in *Brooks* and *Wardius*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1985

IN RE: GRAND JURY INVESTIGATION

SAMUEL G. FERRARO, Witness, *Appellant*

UNITED STATES OF AMERICA, *Appellee*

Appeal from the Order Entered in the United States District Court for the Western District of Pennsylvania at Miscellaneous No. 5883 Finding Petitioner in Civil Contempt

Submitted Under Third Circuit Rule 12(6)
November 27, 1973

Before: KALODNER, ADAMS and ROSENN, *Circuit Judges.*

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Judgment Order

After consideration of all of the contentions made by appellant, including specifically that it was a violation of appellant's Fifth and Sixth Amendment rights to find him in contempt of court for refusal to answer questions before a grand jury pursuant to a grant of use immunity when the appellant has an appeal pending from a criminal

conviction, when appellant did not testify at his criminal trial, and when the grand jury questions are to be propounded by the chief prosecuting attorney in appellant's criminal case, and considering that the government has stipulated in open court that it will not use against the appellant in any way the testimony given by him before the grand jury, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Each party to bear its own costs.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: December 5, 1973

APPENDIX B

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 5883 Miscellaneous

IN RE: GRAND JURY INVESTIGATION

Order of Commitment

AND NOW, to wit, this 13th day of November, 1973, it having been brought to the attention of the Court by the U.S. Attorney that Samuel G. Ferraro, a witness summoned to testify, and ordered by this Court to answer the questions presented, has refused without just cause shown to comply with the Order of the Court to testify before the Grand Jury of the United States now sitting and after the Court having granted immunity, and after the Court having held a hearing thereon, said witness continues to refuse to testify, IT IS ORDERED that the said witness Samuel G. Ferraro be confined at a suitable place of confinement until such time as the witness is willing to give such testimony; said confinement not to exceed the term of the grand jury before which said refusal occurred and in no event to exceed eighteen (18) months.

/s/ HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1985

November 14, 1973

IN RE: GRAND JURY INVESTIGATION

SAMUEL G. FERRARO, *Witness*

SAMUEL G. FERRARO, *Appellant*

(D. C. Misc. No. 5883)

Present: KALODNER, ADAMS and ROSENN, *Circuit Judges.*

1. Appellant's petition to admit to bail pending appeal.

The foregoing petition is denied in light of the government's expression at the oral argument that appellant's testimony before the investigative grand jury will not prejudice future application for reduction of his sentence with respect to his conviction at No. 73-226 Criminal, Western District of Pennsylvania, and the government's further expression that information elicited from appellant before the Grand Jury will not be used at a new trial, if one is granted, on his appeal from his conviction at No. 73-226, Criminal.

It is further ordered that legible typewritten briefs be hand filed and hand received by both sides not later than November 21, 1973. Each side is granted leave to hand file and hand receive a reply brief in legible typewritten form, if it so desires, not later than November 26, 1973.

It is further ordered that the Clerk of this Court list this case for disposition on the merits on Tuesday, November 27, 1973.

By the Court,

/s/ KADLODNER
Judge

Dated: November 15, 1973

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 27 1974

No. 73-1049

In the Supreme Court of the United States

OCTOBER TERM, 1973

SAMUEL G. FERRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1049

SAMUEL G. FERRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he cannot constitutionally be compelled to testify before a grand jury, under a grant of use immunity, concerning crimes for which he has been convicted, while his appeal from that conviction is pending.

Petitioner has been convicted of having made false statements on his federal income tax return, and having conspired to obstruct the enforcement of state laws prohibiting gambling while he was an Allegheny County detective. His appeal from this conviction is presently pending, *United States* v. *Ferraro*, No. 73-1989 (C.A. 3). After his conviction, petitioner was called before a grand jury investigating alleged misconduct by public officials in Allegheny County. On November 13, 1973, he appeared but refused to testify, invoking his privilege against self-incrimination. He was granted immunity pursuant to 18 U.S.C. 6002-6003 but persisted in his refusal to testify. After a hearing, the district court held him in

contempt and ordered him confined until he purged himself of contempt, but not exceeding 18 months or the term of the grand jury (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Petitioner filed this petition for certiorari on January 4, 1974, and Mr. Justice Brennan denied his application for bail on January 11, 1974. On February 11, 1974, he was released from confinement on his agreement to testify before the grand jury. He purged himself of contempt by testifying on March 5, 1974 (App. A, *infra*). Therefore, this petition for certiorari has become moot.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[1]Petitioner agrees with this conclusion, as indicated by his brief filed in the court of appeals on his appeal from his criminal conviction (App. A-3, *infra*).

APPENDIX A-1

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
WESTERN DISTRICT OF PENNSYLVANIA
633 U.S. POST OFFICE & COURTHOUSE
PITTSBURGH, PENNSYLVANIA 15219

MARCH 20, 1974

Harriet S. Shapiro, *Esquire*
Office of Solicitor General
Department of Justice
Room 5140
Washington, D.C. - 20530

Re: Samuel G. Ferraro
Contempt-Refusing to Answer
Grand Jury Questions
No. 73-1985 Third Circuit

Dear Mrs. Shapiro:

This is to inform you that on the 11th day of February, 1974, upon motion of the United States Attorney, the United States District Court of the Western District of Pennsylvania released from confinement Samuel G. Ferraro upon his declaration that he would appear before the grand jury and testify as required by law. Since this order has been sealed until further notice by the court, we are not sending you a copy of that order at this time. On March 5, 1974 Mr. Ferraro did appear before the grand jury and testified. Therefore, he is no longer in contempt of court.

It should also be noted that in the case of *United States* v. *Ferraro*, Court of Appeals No. 73-1989 (an appeal from his conviction for violations of 26 U.S.C. §7206(1) and 18 U.S.C. §1511) Appellant Ferraro

made representation to the Court that the matter concerning his contempt conviction had been rendered moot. A copy of that section of the brief is enclosed with this letter for your convenience.

It would seem that appellant should be estopped from asserting that his contempt conviction is not moot before the Supreme Court in light of this declaration to the Circuit Court.

I hope this will provide you with all the information you need. If not, please do not hesitate to contact me.

Very truly yours,

RICHARD L. THORNBURGH
United States Attorney

By: KATHLEEN KELLY CURTIN
Assistant United States Attorney

Enclosure

APPENDIX A-3

Related Proceedings

Although this matter is not before the Court at the present time, it should be noted that this Court had occasion to consider a related proceeding involving the appellant: *In Re: Grand Jury Investigation, Samuel G. Ferraro, Witness*, No. 73-1985.

Subsequent to the imposition of sentence and the filing of his Notice of Appeal, appellant was subpoenaed to testify before a Federal Grand Jury. He was granted testimonial immunity. However, appellant declined to testify, basically for the reasons that he had not testified in the instant case and his appeal would be prejudiced if Grand Jury testimony were required. He was held in contempt of Court and was incarcerated. After this Court upheld the contempt citation, appellant filed a Petition for Writ of Certiorari in the United States Supreme Court. However, this matter has been rendered moot because the appellant has agreed to testify before the Grand Jury.